

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

WELLS FARGO BANK,  
  
Plaintiff and Respondent,  
  
v.  
  
DAVID R. FUNK,  
  
Defendant and Appellant.

C043127  
  
(Super. Ct. No.  
02AS02587)

Defendant David R. Funk (Funk) appeals from a summary judgment entered in favor of plaintiff Wells Fargo Bank (Wells Fargo) in Wells Fargo's breach of contract, account stated and money had and received action to recover two debts owed by Funk on defaulted business lines of credit. We affirm the judgment.

BACKGROUND

In May 1996, Funk applied for a business credit account from Wells Fargo. The application was granted and a line of credit was extended to Funk. Funk used the line of credit but ceased repayment after September 2001. The balance remaining on

this credit account is \$17,245.38, plus interest at a rate of six percent per annum in excess of Wells Fargo's prime rate.

In October 1997, Funk applied for a second business credit account from Wells Fargo. The application was granted and a line of credit was extended to Funk. Funk used the line of credit but ceased repayment after September 2001. The balance remaining on this credit account is \$8,351.99, plus interest at a rate of 19.8 percent per annum from January 4, 2002.

On both credit applications, Funk agreed to pay reasonable attorney fees incurred by Wells Fargo in collecting amounts due in connection with the credit accounts.

On April 30, 2002, Wells Fargo filed a complaint against Funk for breach of contract, account stated and money had and received to recover the balance and interest owed on two business lines of credit. Wells Fargo thereafter filed a motion for summary judgment which presented evidence of the two lines of credit and their corresponding balances.

In opposition to the motion for summary judgment, Funk submitted an affidavit of Todd-Ellis Swanson -- certified as a public accountant in North Carolina and South Carolina. After "explaining" general accounting principles, the Swanson affidavit states that when Wells Fargo accepted Funk's credit card application, it accepted it as money and deposited this money into an account under Funk's name. According to Swanson, this means Wells Fargo took a loan from Funk and Wells Fargo became the borrower. Swanson continues that Wells Fargo never spent any of its own money and that when Wells Fargo "lent" Funk

the money, it was actually repaying on Funk's loan to Wells Fargo. Therefore, he concludes, "the transaction was complete." In sum, the affidavit, as well as Funk's written argument in opposition to the motion for summary judgment, claims that no debt to Wells Fargo exists.

Wells Fargo objected to the statements in the affidavit as irrelevant and objected that many statements were hearsay, lacked foundation, were speculative and assumed facts not in evidence.<sup>1</sup> The trial court sustained most of Wells Fargo's objections<sup>2</sup> and granted summary judgment in favor of Wells Fargo in the amount of \$28,365.54. Funk appeals.

#### DISCUSSION

A party is entitled to summary judgment if there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A plaintiff is entitled to summary judgment if there is no defense to the action, and "[a] plaintiff . . . has met his or her burden of showing that there is no defense to

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<sup>1</sup> Funk's Request for Judicial Notice of Attached Material, filed April 21, 2003, seeks to designate Wells Fargo's written Objections to the Affidavit of Todd-Ellis Swanson as a supplemental transcript. We shall treat this request as a motion to augment the transcript on appeal and grant the motion.

<sup>2</sup> Although Wells Fargo failed to object to one of the paragraphs in the Swanson affidavit, the trial court declined to consider that paragraph as well, ruling "it fail[ed] to set forth a sufficient foundation, the testimony [was] speculative, lack[ed] relevance and assume[d] facts not in evidence."

a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . ." (Code Civ. Proc., § 437c, subd. (p)(1).) Our review is de novo. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.)

Here, Funk concedes in his appellate brief that Wells Fargo's motion for summary judgment established a prima facie case entitling it to summary judgment, but claims Swanson's affidavit in support of Funk's opposition to the motion for summary judgment created triable issues of fact. Specifically, Funk states in his opening brief on appeal: "Wells Fargo by filing its Motion for Summary Judgment established prima facie evidence of its entitlement to a summary judgment." Briefs are reliable indications of a party's position on both the facts and the law, and a reviewing court may make use of a statement made in a party's brief as an admission against the party. (*DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3.) We therefore accept Funk's admission that Wells Fargo's motion for summary judgment established its entitlement to summary judgment and the burden was then on Funk to show a triable issue of material fact existed as to the cause of action or defense thereto. (See *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 845.)

We reject, however, Funk's claim that Swanson's affidavit in support of Funk's opposition to summary judgment created triable issues of material fact. The trial court properly ruled the bulk of the affidavit irrelevant.<sup>3</sup> In fact, both the affidavit and Funk's memorandum of points and authorities contained nothing more than an incomprehensible theory of accounting that appears to conclude that, somehow, Wells Fargo owes Funk the money extended by the lines of credit.

As aptly put by another court describing Funk's "legal theories," Funk's opposition "contains little more than unintelligible gobbledygook." (*Funk v. Commissioner*, 82 T.C.M. (CCH) 847 (2001).)<sup>4</sup> We decline to regurgitate Funk's incoherent accounting theory and painstakingly explain why it is irrelevant. Like those courts before us that have adjudicated this litigant's claims, "[w]e perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit.'" (*Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417.)

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<sup>3</sup> Wells Fargo's continuing objection to the affidavit as inadmissible because it was not signed under penalty of perjury, however, was properly rejected by the trial court. The notary public's seal indicates the affidavit was executed under oath and, therefore, the affidavit complies with Code of Civil Procedure sections 2003 and 2013.

<sup>4</sup> We also agree with another court's characterization of Funk's "legal theories" as "nothing but frivolous rhetoric and legalistic gibberish." (*Funk v. Commissioner*, 79 T.C.M. (CCH) 2065 (2000).)

There was no evidence disputing that Funk applied for and received two business lines of credit, used the lines of credit, and then failed to repay. Nor was there any dispute as to the balance on either line of credit. Nothing presented by Funk in opposition to Wells Fargo's motion for summary judgment constituted a defense to Wells Fargo's action.

DISPOSITION

The judgment is affirmed. Wells Fargo shall recover its costs on appeal. (Cal. Rules of Court, rule 27(a).)

We concur: BLEASE, Acting P. J.

DAVIS, J.

MORRISON, J.